ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules To the Commission:	CS Docket No. 95-178

COMMENTS

The law firm of Cole, Raywid & Braverman ("CR&B") hereby submits these Comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced proceeding. CR&B files these Comments on behalf of the cable television operators and state cable television associations identified in Attachment A hereto.

INTRODUCTION

The purpose of this proceeding is to determine how the Commission should define the "local" must carry zone for broadcast television stations. The 1992 Cable Act required market designations to be determined consistent with Section 73.3555(d)(3)(i) of the Commission's rules. 47 U.S.C. § 534(h)(1)(C). The FCC properly responded by adopting Arbitron as the official source for market designations. 46 C.F.R. § 76.55(e). The Commission explained that Arbitron's *1991-1992 ADI Market Guide* would be used for the initial 1993 must carry/retransmission consent election, and that ADI assignments would be updated at three year intervals (*i.e.*, the 1994-1995 ADI list would be used for the impending 1996 election). *Id.* at Note.

Confronted with Arbitron's decision to stop publishing its ADI list, the Commission has now asked how must carry markets should be designated. Although the *Notice of Proposed Rulemaking* raises the possibility of switching to Nielsen's "Designated Market Areas" ("DMAs"), it acknowledges a tentative preference for continued reliance on the existing ADI list. *NPRM* at ¶ 7. The *NPRM* explains that this option "has the advantage of providing stability in the television broadcast signal carriage process." *Id.* CR&B supports the Commission's tentative conclusion to continue relying on the existing ADI designations. Any option that involves switching the source of market assignments or a comprehensive "updating" of existing assignments would create needless chaos and frustrate existing viewer patterns.

I. **The Commission Has Statutory Authority To Retain The Existing ADI List for Market Designation Purposes.**

The recently adopted Telecommunications Act of 1996 revisits the issue of "market determinations." It eliminates the rather awkward statutory reference to Section 73.3555(d)(3)(i) of the Commission's rules and instead provides that market determinations shall be made "by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns." Section 301 (*amending* 47 U.S.C. § 614(h)(1)(C)). This statutory amendment, which admittedly gives the Commission discretion to rely on an alternative ratings service (like Nielsen), also is entirely consistent with a continued reliance on Arbitron's existing ADI list.

In fact, if Congress had wanted the FCC to replace Arbitron's existing ADI list with Nielsen's updated DMA list, it presumably would have made that clear in this statutory provision. But there is no mention in the statute of the need to switch rating companies or even to ensure that the data used is continually updated. This conspicuous silence in Congress' instructions leaves the Commission with discretion to continue using the existing ADI list. That list is, consistent with Congress' instructions, the result of a "commercial publication which delineates television markets based on viewing patterns."

II. The Commission Should Maintain the Existing ADI List for Market Designation Purposes

Although the use of current ratings to determine market designations may be superficially appealing, the truth is that such updating would be counter to the public interest. The potential disruption resulting from such updating would be exacerbated where, as here, the updating can be accomplished only by switching the responsible ratings company.[1]

The Commission should not embark lightly on a regulatory program that threatens to unnecessarily disrupt cable carriage. Cable subscribers do not like constant changes in the services offered them. For that reason, cable operators traditionally have minimized programming changes. While changing market designations might prove a windfall for certain broadcasters, the associated burdens on cable operators and cable subscribers would far outweigh these very limited benefits.

[1] Although Nielsen proponents are likely to emphasize the importance of "up-to-date" data, any market changes resulting from use of current Nielsen reporting are more likely to result from a switch in the responsible survey company than from a switch in the applicable timeframe. Historically, neither Arbitron nor Nielsen have made dramatic changes to their market assignments from one reporting period to the next.

The Commission itself has recognized the importance of minimizing unnecessary carriage disruptions in the must carry context. It previously announced, "During the pendency of a [market modification] petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage."[2] This well-founded concern about viewer disruption argues strongly against mandating wholesale adjustments to the list of market assignments.

The critical importance of stability and predictability is heightened in the must carry/retransmission context by the tremendous effort that must be made by the cable industry to ensure that is in regulatory compliance and has secured all necessary authorizations. If markets were routinely redesignated, cable operators would need to continually recheck the market designation of each cable system and each broadcast station assigned to that market. Analyses undertaken for the 1993 election might be of little use to the 1996 election. And the possibility of market reassignments would make it much more difficult to negotiate carriage agreements encompassing more than one election period. Even in areas not directly affected by market changes, the specter of change would complicate an already difficult process. And where carriage changes were indicated, a panoply of signal quality tests, subscriber notifications, and channel realignments might be required.

It must be remembered that the regulatory change proposed here would also have significant copyright ramifications. Pursuant to the Satellite Home Viewer Act, the copyright liability associated with cable carriage of broadcast stations now depends directly on each

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[2] *Report and Order in MM Docket* 92-259, 8 FCC Rcd 2965 at ¶ 46 (1992). *See also* 47 U.S.C. § 614(h)(1)(C)(iii).

station's must-carry assignment. *See* 117 U.S.C. § 11(f). The Copyright Office recently confirmed that copyright liability will be determined by whatever market definition the Commission adopts. *Cable Compulsory Copyright License*, Fed. Reg. 65072, 65074 (Copyright Office 1995) (Notice of Policy Decision, Docket No. 95-8). As a result, if the Commission adopts a new market designation scheme, broadcast stations which previously could be carried without any additional copyright liability might now impose substantial copyright liability. This development would make it difficult for cable operators to continue carrying stations that are suddenly assigned to a different market.

Perhaps most importantly, a mechanism already exists to "update" the existing list of market assignments. Pursuant to Section 614(h)(1)(C) of the Act, and Section 76.59 of the Commission's rules, cable operators and broadcasters alike may petition to modify an existing television market on a case-by-case basis. Numerous parties have taken advantage of this provision over the past several years to "fine tune" must carry assignments. Although CR&B certainly has not been happy with every market modification decision released by the Commission, the mechanism does provide a relatively simple means to adjust the existing Arbitron list without triggering the wholesale changes inherent in a switch to the Nielsen list. Moreover, while the number of market modification requests over the past several years has been significant, they have not been so overwhelming as to suggest that the existing Arbitron list is now an inappropriate source for initial market designations. In fact, a switch to Nielsen now is likely to prompt a whole new round of modification requests wherever Nielsen and Arbitron disagree in their market assignments.[3] Anomalies in the ADI list, now largely resolved, doubtlessly would be replaced by a new set of anomalies inherent to the DMA list.

CONCLUSION

For the foregoing reasons, Cole, Raywid & Braverman respectfully requests that the Commission adopt its "second option" and retain the existing ADI list for purposes of determining governing must carry zones. Maintaining the 1991-1992 ADI list will minimize both administrative confusion and viewer disruption. The existing market modification procedures already provide a mechanism to correct anomalies in the ADI list, and the Commission can always initiate a rulemaking in the future in the unlikely event that the existing ADI list becomes increasingly outdated.

Respectfully submitted,

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[3] Should the Commission reverse its tentative conclusion and decide to abandon the existing ADI list, CR&B urges the Commission to delay the change until the next election period. A change in market designations at this point would greatly complicate the imminent must carry/retransmission consent election process.

Attachment A

Antietam Cable
Charter Communications, Inc.
Greater Media, Inc.

Colorado Cable Television Association
Cable Television Association of Georgia
Indiana Cable Television Association
Cable Television Association of Maryland, Delaware and the District of Columbia
Michigan Cable Telecommunications Association
Pennsylvania Cable and Telecommunications Association
South Carolina Cable Television Association
Tennessee Cable Television Association
Wisconsin Cable Communications Association